Chitra a/p Danapalan v Augustine Charles a/l Retnasingam

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8–33–1449 OF 2003
YEOH WEE SIAM J
2 APRIL 2012

Civil Procedure — Res judicata — Decision, finality of decree nisi — Issues raised in earlier application — Whether issue raised again in present application — Whether present application caused inordinate delay — Whether fresh application could be filed on same issues — Whether matter res judicata

Family Law — Financial obligations — Maintenance — Mode of application — Divorce and Matrimonial Proceedings Rules 1980 r 56(1), (2) and (3) for ancillary relief — Whether the petitioner's applications would be limited by s 86(3) of the Law Reform (Marriage and Divorce) Act 1976 in respect to arrears of maintenance

The respondent husband ('RH') was ordered to pay the petitioner wife ('PW') monthly maintenance of 25% of his income by virtue of the decree nisi dated 24 June 2004 ('the decree nisi'). However, the Court of Appeal on 7 July 2010 varied the monthly maintenance payable by RH to 15% of his net income ('the order'). A notice of motion by RH for leave to appeal to Federal Court against the order of the Court of Appeal was dismissed on 20 October 2010, resulting in RH to be bound by the Court of Appeal's decision. Subsequently, the RH appealed against certain parts of a decision made in chambers on 28 February 2012 in respect to PW's application in encl 182 for, inter alia: (i) that the RH pay monthly maintenance of 15% pursuant to the order read together with the decree nisi; and (ii) that the RH to produce information and documents pertaining to all of RH's income for the purpose to assess RH's total income. RH argued, inter alia, that: (i) there was inordinate delay by the PW in filing encl 182; (ii) the PW's application in encl 182 was res judicata as her applications in encl 152 and encl 174 (the amended encl 152) were dismissed on 15 April 2012; and (iii) the PW should have enforced the order for maintenance by way of civil suit under s 86 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') for recovery of maintenance. However, the PW averred that she filed encl 152 and encl 174 as she had difficulties in enforcing the decree nisi and RH did not disclose his monthly income.

Held, allowing the PW's application:

(1) The PW ought to have filed a notice of application for ancillary relief in

Form 11 under r 56(1), (2) and (3) of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMP Rules') and not by summons in accordance to r 91(b) of the DMP Rules as the decree nisi is a final order. Nevertheless, there was no inordinate delay on the part of PW. The PW's applications in encls 152 and 174 and finally the application in encl 182 were dismissed on technical grounds, but with a liberty granted to her to file afresh (see para 11).

(2) The PW had proceeded correctly through her application in encl 182. Section 86(1) of the LRA will only be applicable when the PW wishes to enforce the decree nisi for recovery of arrears of maintenance. The PW applications would not be limited by s 86(3) of the LRA as she is applying for arrears of maintenance after the filing the divorce petition, under the decree nisi dated 23 June 2004, — the order of which was made subsequent to the filing of the divorce petition — read together with the order of the Court of Appeal dated 7 July 2010 (see paras 19–20)

(3) The RH had failed to comply to the order of the Court of Appeal dated 7 July 2010. Hence, RH must disclose fully in court in the manner as stated in prayers (b) and (c) in encl 182 in order the PW can determine the actual amount of maintenance that is payable to her by the RH before she can commence enforcement proceedings against him. Inherent powers of the court were invoked under O 92 r 4 of the Rules of the High Court 1980 to ensure compliance by the RH (see paras 29–30).

[Bahasa Malaysia summary

Responden suami ('RS') diperintahkan membayar pempetisyen isteri ('PI') nafkah bulanan sebanyak 25% pendapatannya berikutan dekri nisi bertarikh 24 Jun 2004 ('dekri nisi tersebut'). Walau bagaimanapun, Mahkamah Rayuan pada 7 Julai 2010 mengubah nafkah bulanan yang perlu dibayar oleh RS kepada 15% jumlah pendapatannya ('perintah tersebut'). Notis usul oleh RS untuk kebenaran merayu ke Mahkamah Persekutuan terhadap perintah Mahkamah Rayuan ditolak pada 20 Oktober 2010, menyebabkan RS terikat dengan keputusan Mahkamah Rayuan. Kemudian RS merayu terhadap bahagian tertentu keputusan tersebut yang dibuat di kamar pada 28 Februari 2012 berkaitan dengan permohonan PI dalam lampiran 182 untuk, antara lain: (i) bahawa RS membayar nafkah bulanan sebanyak 15% berikutan perintah tersebut dibaca bersama dengan dekri nisi; dan (ii) bahawa RS mengemukakan maklumat dan dokumen-dokumen berkaitan denga kesemua pendapatan RH bagi tujuan menilai jumlah keseluruhan pendapatan RS. RS menghujah, antara lain, bahawa: (i) terdapat kelewatan tidak munasabah oleh PI dalam memfailkan lampiran 182; (ii) permohonan PI dalam lampiran 182 adalah res judicata kerana permohonannya dalam lampiran 152 dan lampiran 174 (lampiran 152 terpinda) ditolak pada 15 April 2012; dan (iii) PI sepatutnya melaksanakan perintah untuk nafkah secara guaman sivil di bawah s 86 Akta Pembaharuan (Perkahwinan dan Perceraian) 1976 ('Akta') untuk

mendapatkan nafkah. Walau bagaimanapun PI menyatakan bahawa dia memfailkan lampiran 152 dan 174 kerana dia menghadapi kesulitan dalam melaksanakan dekri nisi dan RS tidak mendedahkan pendapatan bulanannya.

Diputuskan, membenarkan permohonan PI:

(1) PI sepatutnya memfailkan notis permohonan untuk relief sampingan dalam Borang 11 di bawah k 56(1), (2) dan (3) Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980 (Kaedah) dan bukan melalui saman berikutan k 91(b) Kaedah kerana dekri nisi merupakan perintah terakhir. Walau bagaimanapun terdapat kelewatan yang tidak munasabah pada pihak PI. Permohonan PW dalam lampiran 152 dan 174 dan akhirnya permohonan dalam lampiran 182 ditolak atas alasan teknikal, tetapi kebebasan diberikan untuknya memfailkan semula (lihat perenggan 11).

(2) PI telah meneruskan secara betul melalui permohonannya dalam terpakai lampiran 182. Seksyen 86(1) Akta hanya beraplikasi apabila PI ingin melaksanakan dekri nisi untuk mendapatkan semula tunggakan nafkah. Permohonan PI tidak akan dihadkan oleh s 86(3) Akta kerana dia memohon untuk tunggakan nafkah selepas memfailkan petisyen perceraian, di bawah dekri nisi bertarikh 23 Jun 2004, — perintah yang dibuat selepas pemfailan petisyen perceraian — dibaca bersama dengan perintah Mahkamah Rayuan bertarikh 7 Julai 2010 (lihat perenggan 19–20).

(3) RS telah gagal mematuhi perintah Mahkamah Rayuan bertarikh 7 Julai 2010. Maka RS mesti mendedahkan secara penuh di mahkamah seperti yang dinyatakan di dalam permohonan (b) dan (c) lampiran 182 supaya PI boleh menentukan jumlah nafkah yang perlu dibayar kepadanya oleh RS sebelum dia boleh memulakan prosiding pelaksanaan terhadap RS. Bidang kuasa sedia ada mahkamah dibangkitkan di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk memastikan kepatuhan oleh RS (lihat perenggan 29–30).]

Notes

For cases on maintenance, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3883–3921.

For cases on res judicata, see 2(3) *Mallal's Diegst* (4th Ed, 2010 Reissue) paras 6675–6808.

Cases referred to

Kewangan Bersatu Bhd v Yap Ah Yit & Ors [1998] 7 MLJ 442; [1999] 1 CLJ 429, HC (refd)

Malaysia National Insurance Sdn Bhd v Tan Kong Ming [1996] MLJU 525; [1997] 1 CLJ Supp 121, HC (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 rr 2(1), 56, 56(1), (2), (3), 61(2), 91(b), Form 11
Law Reform (Marriage and Divorce) Act 1976 s 86, 86(1)(3)
Rules of the High Court 1980 O 92 r 4

David Charles (Nur Ashikin Alex & Rakan-Rakan) for the petitioner wife.
Won Walter Pereira (Kamarudin & Partners) for the respondent husband.

Yeoh Wee Siam J:

APPEAL

[1] This is an appeal by the respondent husband ('the RH') regarding the following part of my decision made in chambers on 28 February 2012 in respect of encl 182:

> (b) That the income of the Respondent be assessed by this Honourable Court so as to enable the Respondent to pay the monthly maintenance of 15% from his net income for the expenses and upkeep of the Applicant pursuant to the Order of the Court of Appeal dated 07.07.2010 read together with the Decree Nisi dated 23.06.2004; and
>
> (c) That the Respondent be required to produce, during the hearing herein for the assessment of the Respondent's income, all his current income, amongst others, particulars of rental income from all properties registered under the name of the Respondent and/or belonging to the Respondent, income from all investments and income from all other sources, copies of his pay slips and Tenancy Agreements and the Respondent's Bank Statements.

BACKGROUND FACTS

[2] In the decree nisi dated 23 June 2004 ('the decree nisi') the High Court ordered, inter alia, that the RH pays a monthly maintenance of 25% of his income for the expenses and upkeep of the PW from the date of the decree nisi (see exh CD1 at pp 8A–9 of encl 183).

[3] However, the Court of Appeal had on 7 July 2010, inter alia, ordered that the decree nisi, which ordered the RH to pay 25% from his income, be varied to 15% from the RH's net income as payment for the PW's monthly maintenance (see exh CD2 at pp 12–13 of encl 183).

[4] The RH's notice of motion dated 6 August 2010 for leave to appeal to the

Federal Court against the above order of the Court of Appeal was dismissed with costs on 20 October 2010 (see exh CD5 at pp 11–12 of encl 179).

[5] Therefore, the position now is that the order of the Court of Appeal dated 7 July 2010 ordering the RH to pay a monthly maintenance of 15% from his net income for the expenses and upkeep of the PW is a final order and binding on the RH.

DECISION

[6] After hearing both parties on the PW's application in encl 182, and based on the evidence adduced, the submissions of both parties, and the law applicable, I allowed the PW's application only in respect of prayers (a), (b) and (c), and ordered the RH to pay costs of RM1,000. I did not allow prayer (d).

[7] The appeal by the RH is regarding my decision in allowing prayers (b) and (c).

REASONS FOR MY DECISION

Whether there is inordinate delay by the PW in filing encl 182

[8] Counsel for the RH submitted that the PW filed a similar application in encl 152 (which was amended as in encl 174) about six years after the decree nisi. This inordinate delay gives rise to laches on the part of the PW which would disentitle the PW for leave, after close to six years (see *Kewangan Bersatu Bhd v Yap Ah Yit & Ors* [1998] 7 MLJ 442; [1999] 1 CLJ 429 and *Malaysia National Insurance Sdn Bhd v Tan Kong Ming* [1996] MLJU 525; [1997] 1 CLJ Supp 121).

[9] With respect, I do not think that there is any inordinate delay on the part of the PW. The appeal by the RH regarding the decree nisi dated 23 June 2004 was only decided by the Court of Appeal on 7 July 2010. The Court of Appeal varied the wife's monthly maintenance from 25% of the RH's income to 15% of the RH's net income. The RH then applied for leave to appeal to the Federal Court. It was only on 20 October 2010 that the Federal Court dismissed the RH's application for leave to appeal.

[10] As submitted by counsel for the RH, it is true that there was no stay granted on the decree nisi and the PW could have enforced the decree nisi. However, the PW averred that she had difficulties in enforcing the decree nisi since the RH made no attempts to pay her the monthly maintenance or to disclose what his monthly income is.

[11] Enclosure 152 was filed by the PW on 27 May 2010. Enclosure 174 (ie the amended encl 152) was finally heard by me on 15 April 2011. I dismissed the PW's application on technical grounds, but with liberty granted to her to file afresh. I held that the correct mode of commencement would be by way of a notice of application for ancillary relief in Form 11 under r 56(1)–(3) of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMP Rules'), and not by way of a summons in chambers as in encl 174.

[12] Rule 56 of the DMP Rules provides as follows:

> ANCILLARY RELIEF
>
> Application by petitioner or respondent for ancillary relief.
>
> 56
>
> (1) Any application by a petitioner, or by a respondent who files an answer claiming relief, for —
>
> (a) an order for maintenance pending suit;
>
> (b) property division order, under section 76 of the Act; or
>
> (c) a maintenance order, under section 77 of the Act,
>
> shall be made in the petition or answer, as the case may be.
>
> (2) Notwithstanding paragraph (1), an application for ancillary relief which should have been made in the petition or answer may be made subsequently —
>
> (a) by leave of the court, either by notice in Form 11 or at the trial; or
>
> (b) where the parties are agreed upon the terms of the proposed order, without leave by notice in Form 11.
>
> (3) An application by a petitioner or respondent for ancillary relief, not being an application which is required to be made in the petition or answer shall be made by notice in Form 11.

[13] The term 'ancillary relief' has been defined in r 2(1) of the DMP Rules to mean, inter alia, a financial provision order, which is wide enough to cover the order sought by the PW in prayers (b) and (c) of encl 182.

[14] Under r 91(b) the DMP Rules, an application in matrimonial proceedings can only be made by summons if proceedings are still pending in the High Court. In this case, the decree nisi is a final order and there being no longer any pending proceedings under the divorce petition in encl 1, the PW should not make her application by a summons (which she did in encl 174).

[15] In view of the RH's appeal to the Court of Appeal, and later his application for leave to the Federal Court, I do not think that there was any inordinate delay by the PW to file the application in encls 152 and 174, and finally the application in encl 182.

Whether the PW's application in encl 182 is res judicata

[16] Counsel for the RH submitted that a similar application in encl 174 was heard and dismissed by the High Court on 15 April 2012. Therefore, the PW's application in encl 182 is res judicata.

[17] As I have stated above, when I dismissed the PW's application in encl 174, it was purely on technical grounds. The application was not heard or decided on its merits. Therefore, since the substantive issues in encl 182 have not been decided by the court yet, encl 182 ought to be heard by this court. The principle of res judicata does not apply to encl 182.

Whether the PW should have enforced the order for maintenance by way of a civii suit for recovery of maintenance

[18] Counsel for the RH cited s 86 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') which provides as follows:

> 86 Recovery of arrears of maintenance
>
> (1) Subject to subsection (3), arrears of unsecured maintenance, whether payable by agreement or under an order of court, shall be recoverable as a debt from the defaulter and, where they accrued due before the making of a receiving order against the defaulter, shall be provable in his or her bankruptcy and, where they accrued due before his or her death, shall be a debt due from his or her estate.
>
> (2) Subject to subsection (3), arrears of unsecured maintenance which accrued due before the death of the person entitled thereto shall be recoverable as a debt by the legal personal representatives of such person.
>
> (3) No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit.

[19] Upon a perusal of the PW's prayers in encl 182, I noted that PW is not seeking, at this point in time, to enforce the decree nisi to recover arrears of maintenance from the RH. She has averred that she has difficulties in enforcing the decree nisi due to lack of cooperation by the RH to disclose his true income. She required prayers (b) and (c) in order to derive at the gross income and then the net income of the RH before she could enforce the decree nisi for recovery of arrears of maintenance, and for payment of current maintenance. She had therefore embarked on the correct first step through her application in encl 182 ie to compel the RH to disclose his income before a computation can be made on the exact amount of maintenance to be paid to her. Section 86(1) of the LRA will only be applicable later on when the PW wishes to enforce the decree nisi for recovery of arrears of maintenance.

[20] As for s 86(3), I do not think that the PW is limited by the limit of three years of arrears of maintenance accrued before the institution of the suit. In the PW's case, she is applying for arrears of maintenance after the filing of the divorce petition, under the decree nisi dated 23 June 2004, (which order was made subsequent to the filing of the divorce petition), read together with the order of the Court of Appeal dated 7 July 2010.

Whether leave should be allowed

[21] I will not deal with the issue of whether leave should be granted for the filing of encl 182 since that is not the subject matter of this appeal. Suffice to state here that I granted prayer (a) of encl 182, which is for leave for the PW to make such application.

OTHER REASONS

[22] On the whole, I am satisfied that prayers (b) and (c) ought to be allowed. This is because under the decree nisi, the RH was ordered to pay 25% from his income for the PW's monthly maintenance. This order was subsequently varied by the Court of Appeal to 15% from the RH's net income. It would not be possible for the PW to enforce the order of the Court of Appeal without knowing what the RH's total or gross income and monthly expenditure are before she can calculate what is the RH's net income from which 15% has to be paid to the PW as her monthly maintenance.

[23] As submitted by counsel for the PW, the word 'income' has been defined in *Black's Law Dictionary* (7th Ed), as follows:

'income' The money or other form of payment that one receives, usually periodically, from employment, business, investments, royalties, gifts, and the like.

'Gross Income' Total income from all sources before deductions, exemptions, or other tax reductions — Also termed gross earnings.

'Net Income' Total income from all sources minus deductions, exemptions, and other tax reductions. Income tax is computed on net income — Also termed net earnings.

[24] It is obvious that the PW is facing severe hardship in enforcing the order of the Court of Appeal dated 7 July 2010. Besides ordering the variation for the amount of the PW's monthly maintenance, the Court of Appeal, in the same order, had also ordered the RH to transfer his property known as Unit No 13A-12/A2, 38 Bidara Service Apartment, No 30 Jalan Bedara, Kuala Lumpur to the PW, subject to encumbrances. However, according to the PW, until today this has not been complied with by the RH. The PW also averred that the rental income of this apartment is not less than RM2,500 per month but she is not getting such rental. It is highly probable that the RH is collecting the rental and keeping it.

[25] Other than the above apartment, the PW averred in encl 183 that the RH is collecting rental income from his other properties, amongst others, as follows:

(a) Lot No PT 14247, Mukim Damansara, Daerah Petaling with an address at No 35, Jalan USJ 9/5E, 47620 Subang Jaya, Selangor Darul Ehsan. This property is the matrimonial home, and was valued then at not less than RM350,000 without encumbrances (now it has a value of not less than RM750,000);

(b) Unit No C-2-1, First Floor, Block C, Pangsapuri Langat Utama, Jalan Pramugara, Bukit Changgang, 42700 Banting, Selangor Darul Ehsan. This property is an apartment Lot with rental income, and was valued then at not less than RM700 per month;

(c) Unit 3-13A, Pantai Panorama Condominium, Jalan 112H, Off Jalan Kerinchi, 59200 Kuala Lumpur.
This property is a condominium lot with rental income, and was valued then at not less than RM2,000;

(d) Unit No 10-17B, 10th Floor, Belvedere Service Condominium, Lagoon Perdana, Bandar Sunway, Selangor Darul Ehsan.
This property is a serviced apartment lot, 70% completed, and was valued then at RM105,000 (as at 70% completed); and

A (e) Unit No 10-18B, 10th Floor, Belvedere Service Condominium, Lagoon Perdana, Bandar Sunway, Selangor Darul Ehsan.
This property is also a Serviced Apartment Lot, 70% completed, and was valued then at RM105,000 (as at 70% completed).

B **[26]** The PW does not have all the salary slips of the RH for the material period, other than the ones showing his net salary from March 2007 to May 2007. It is essential to the PW that the RH discloses his relevant salary slips under a court order made pursuant to encl 182.

C **[27]** Rule 61(2) of the DMP Rules provides as follows:

> Where a respondent or a petitioner is served with a notice in Form 11 or 13 in respect of an application for ancillary relief, not being an application to which Rule 62 or 63 applies then, unless the parties are agreed upon the terms of the proposed order, he shall, within 14 days after service of the notice, file an affidavit in answer to the application containing full particulars of his property and income, and if does not do so, the court may order him to file an affidavit containing such particulars.

D

E **[28]** Pursuant to r 61(2) of the DMP Rules, once the RH is served with the PW's application in Form 11, as in encl 182, he shall, within 14 days, file an affidavit in answer to the application containing full particulars of his property and income. However, the RH failed to do so. Therefore, it is necessary for the
F court to order him to do so, alternatively, under prayer (c) of encl 182.

[29] It is only by the RH's full disclosure in court in the manner as stated in prayers (b) and (c) in encl 182 that the PW can determine the actual amount of
G maintenance that is payable to her by the RH before she can commence enforcement proceedings against him.

[30] In addition to the above rationale, I also invoked the court's inherent powers under O 92 r 4 of the Rules of the High Court 1980 which provides as
H follows:

Inherent power of the court (O 92,r 4)	4. For the removal of doubts it is hereby declared that nothing in rules shall be deemed to limit or affect the inherent power of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process the the Court.

I

[31] Based on the above reasons, I therefore ordered accordingly.

PW's application allowed.

Reported by Masrifah Ravendran